CHASE MANHATTAN BANK, N.A.

v.

MALAYAN UNITED FINANCE BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. F 31-1770-86]
8 APRIL 1987

CIVIL PROCEDURE: *Priorities of distribution of proceeds of auction - National Land Code - Section 268(1)(c) - Construction and interpretation of.*

This was an application by originating summons for construction and interpretation of s. 268(1) of the National Land Code, particularly s. 268(1)(c) of the Code, in respect of the application of the money which are the proceeds of an auction. The plaintiff claims that the defendant is not entitled to claim any interest accrued and due to it, under the first charge after the time of sale i.e. the day of auction, as it is not a priority debt as against the amount due to the plaintiff under the second charge.

Held:

[1] The wordings of s. 268(1)(c) are clear and unambiguous and therefore the defendant is entitled only to be paid the total amount due under the first charge as at the date of the auction. He is not entitled to claim the interest that has accrued after that date as such interest (in the sum of RM14,315.01) does not rank in priority to the amount due to the plaintiff under the second charge.

[2] Thus, the plaintiff is entitled to be paid the said sum of RM14,315.01 towards settlement of the balance due on the second charge and it was ordered that the stakeholders pay out that sum to the plaintiff immediately.

[Defendant to bear costs of these proceedings]

Legislation referred to:
National Land Code 1965, ss. 242(2)(b), 260, 268(1), 268(1)(a), 268(1)(d), 268(1)(e)

For the plaintiff - Yoong Sin Min; M/s. Shook Lin & Bok
For the defendant - Tan Bu Kian; M/s. Sothi & Ang

JUDGMENT

Siti Norma Yaakob J:

The events leading to the filing of this originating summons happened in the following manner.

On 18 December 1981, one Chen Tuck Chong (the chargor), obtained a housing loan of RM61,000 from the defendant and as security, he charged the very same piece of property he had purchased with the loan, to the defendant. This first legal charge was registered on 4 January 1982.

On 8 June 1982, the plaintiff, through its solicitors, applied for the defendant's consent to create a second legal charge over the same property to enable it to grant a loan of RM50,000 to the chargor for the benefit of syarikat Liver Plastik. On 21 June 1982, the defendant confirmed that it had no objection to the creation of a second legal charge over the property

in favour of the plaintiff subject to the undertaking that its interests in the property shall rank first in priority over the plaintiff's interests. Pursuant to this undertaking, the chargor created a second legal charge over the same property in favour of the plaintiff subject to the first charge. This second third party charge was registered on 5 August 1982.

On 24 July 1984, the Land Administrator, Wilayah Persekutuan issued an order of sale by public auction of the property pursuant to an application made by the defendant under s. 260 of the National Land Code. At the auction held on 27 September 1984, the property was sold to the highest bidder, one Sundara Raju s/o Parathesi Pillai, (the purchaser), for RM126,000. The purchaser paid a deposit of RM31,500 leaving a balance of RM94,500, which under condition 6 of the proclamation of sale, must be paid within 14 days from the date of auction, i.e. on or before 11 October 1984. However, the purchaser only settled the balance on 19 January 1985, a 3 months delay that was consented to by the Land Administrator as the purchaser, a civil servant, had applied for a Government loan to settle the balance of the purchase price and the approval and release of such a loan had taken some time.

In any event, upon receipt of the balance of the purchase price, the Land Administrator issued his certificate of sale dated 19 January 1985. However, the proceeds of the sale was not paid out by the Land Administrator to the defendant until 17 March 1986, almost 18 months after the date of the auction and 14 months after the balance of the purchase price was paid. The causes of this delay were attributed to the following factors.

(1) There was a misunderstanding as to the extension of time granted by the Land Administrator to the purchaser to settle the balance of the purchase price.

(2) There were differences in opinion as to the priorities of distribution of the balance of the proceeds of sale between the plaintiff and the defendant.

(3) A private caveat had been lodged by a third party but this had been subsequently withdrawn.

(4) The Land Administrator before paying out the proceeds of sale, had to ascertain all moneys payable to the state authorities under s. 268(1)(a) National Land Code.

To prevent further delay in paying out the balance of the proceeds of sale, the plaintiff and defendant met the Land Administrator on 6 September 1985 where it was agreed that the balance of the proceeds of sale be paid out to Messrs. Sothi & Ang, solicitors for the defendant, as stake-holders. Despite this arrangement, it took the Land Administrator another 6 months to pay out the balance of the proceeds of sale and it was only on 17 March 1986 that Messrs. Sothi & Ang received the sum of RM123,980 being the balance of the proceeds of sale from the Land Administrator.

As a consequence of the delay in paying out the proceeds of sale to the defendant, interest on the first charge continued to run and accrue up to 17 March 1986, and the defendant maintains that it is entitled to claim such interest as part of the money due and owing by the chargor under the first charge. The plaintiff naturally objects to this contention and maintains that the defendant is only entitled to collect all moneys due to it under the first charge as at 27 September 1984, the date of auction and whatever interest that had accrued and due to the defendant after that date until 17 March 1986 is not a priority debt as against the amount due to the plaintiff under the second charge. That interest comes to RM14,315.01 which is presently held by Messrs. Sothi & Ang as stakeholders pending the decision of this Court and is calculated as follows.

(1) Amount received from the Land Administrator on 17 March 1986		RM123,980.00
(2) Amount due and paid to the defendant on first charge as at 27 September 1984	RM76,842.60	
(3) Amount paid to the plaintiff in settlement of part of the sum due under the second charge	RM32,822.59	
(4) Total paid to both plaintiff and defendant		RM109,664.99
(5) Amount claimed by the defendant from 28 September 1984 to 17 March 1986 by way of interest		RM 14,315.01

Thus the only issue before me is only on the priorities of distribution of the proceeds of the auction, the application of which is contained in s. 268(1) of the National Land Code in the following order,

(a) firstly, in the payment of rent to the state authority ...;

(b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Collector as the case may be) incurred in connection with the making and carrying into effect of the order for sale;

(c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of sale;

(d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to para. (b) of sub-section (2) of s. 242; and

(e) fifthly, in the payment of subsequent charges, if any, in the order of their priority.

There is no dispute as to the application of payments under (a) and (b) as the amount of RM123,980 received by the defendant from the Land Administrator on 17 March 1986, had already taken into consideration such outgoings and expenses as stated in (a) and (b). It is only in respect of the application of the money under (c) that is in issue and to that extent, s. 268(1)(c) comes under close scrutiny as to its meaning and effect.

The defendant sought to justify its claim by relying on s. 268(1)(d), particularly in relation to the satisfaction of payments subsequently falling due under s. 242(2)(b). Since these 2 sections of the National Land Code refer to a charge to secure the payment of an annuity or other periodic sum like maintenance, they have no relevancy to the defendant's charge which is a charge to secure the payment of a loan.

The defendant also relies on Clause 11 of the annexure to the first charge which sets out the contractual obligation of the chargor, to pay any balance sum owing even after sale. The defendant maintains that since the plaintiff is aware of the defendant's prior rights, it should also be aware of Clause 11 of the first charge. Reading Clause 11, what it purports to do its cover the situation where the proceeds of sale is insufficient to satisfy the amount due and owing under the charge. Under these circumstances, the chargor is not discharged from his obligation to pay the full sum due but is contractually bound to settle any balance sum due under the charge after sale. This situation does not arise on the facts of the case before me as the proceeds of the auction is more than enough, not only to settle the amount due under the first charge inclusive of interest calculated up to 17 March 1986, but also part of the amount due under the second charge.

Section 268(1)(c) speaks of payment of the total sums due under a charge at the time of sale. In my opinion, the expression, "time of sale" can only mean what it purports to say, the time of sale which in this case is the date of the auction. The sale is completed at the date of the auction even though at that point of time, the purchase price has not been settled in full, the purchaser being given a 14 days grace to settle the balance. He is not charged any interest during the 14 days and this fact alone lends further support that the sale is deemed to have been completed as at the date of auction.

In default of payment of the balance within the time limited, the Land Administrator must declare the auction to be abortive, fix another auction date and forfeit the deposit to the chargee after defraying his expenses in conducting the abortive sale. This is clearly stated in condition 7 of the proclamation of sale. Under condition 12, time is made an essence of the contract of sale and to that extent, the Land Administrator has no authority to grant any extension of time to the purchaser within which to settle the balance of the purchase price. By doing so, the Land Administrator has clearly acted well beyond the bounds of his authority for which he can be held personally liable.

Since the wordings of s. 268(1) (c) are clear and unambiguous and on its true construction and read with para. (e) of sub-section (2) of s. 268, the defendant is only entitled to be paid the total amount due under the first charge as at the date of the auction on 27 September 1984. He is not entitled to claim the interest that has accrued after that date to 17 March 1986 as such interest does not rank in priority to the amount due to the plaintiff under the second charge. Thus, the plaintiff is entitled to be paid the sum of RM14,315.01 towards settlement of the balance due on the second charge and I accordingly order that Messrs. Sothi & Ang pay out that sum to the plaintiff immediately. The defendant shall also bear the costs of these proceedings.

Also found at [1987] 2 CLJ 138